FORM NLRB-4479
(3-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASI RCC, Inc. 1/

Employer

And

Case No. 11-RC-6459

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 132, AFL-CIO 2/

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6) (7)* of the Act for the following reasons: 4/

SEE ATTACHED

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **October 9, 2001**.

Dated September 24, 2001

at Winston-Salem, North Carolina

/s/Willie L. Clark, Jr.

Regional Director, Region 11

1/ The name of the Employer appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

3/ The Employer, ASI RCC, Inc., is a Colorado corporation engaged in heavy civil construction work in various states in the United States, including West Virginia. The Bluestone Dam project of the Employer, which is located in Hinton, West Virginia, is the only location involved in this proceeding. During the preceding twelve-month period, the Employer, in the course and conduct of its business operations, has purchased and received at its Hinton, West Virginia project, materials valued in excess of $50,000, directly from points outside the state of West Virginia. During this same representative period of time, the Employer, in the course and conduct of its business operations throughout the United States, provided services to customers outside the state of West Virginia, valued in excess of $50,000.

4/ Both the Employer and the Petitioner filed briefs which have been carefully considered.

The Petitioner seeks a unit of all employees of the Employer who are working in the classification of operating engineer at the Employer's Hinton, West Virginia construction site. The Employer contends that there is no operating engineer classification at the Bluestone Dam site; rather, the correctly-designated classification is that of equipment operator. There are four employees of the Employer in the classification of equipment operator. The Petitioner seeks to represent a bargaining unit comprised only of the employees in this equipment operator classification, which it contends constitutes an appropriate unit. In addition, the Petitioner contends that foremen are Section 2(11) supervisors and should be excluded from the bargaining unit. The Petitioner has stated that it does not wish to proceed in any unit larger than that for which it has petitioned.

The Employer, pursuant to a contract with the U.S. Army Corps of Engineers, is involved in a three-phase construction project near Hinton, West Virginia, at Bluestone Dam on the New River. The first phase, which is currently underway, involves the construction of a temporary bridge for access. The Employer hired its first employee for the project in the spring of 2001, and the project is expected to extend for at least three or more years. At the time of the filing of the petition, the Employer employed 21 employees at its Bluestone Dam construction site. The Employer maintains that the appropriate bargaining unit should include all of these employees. There has been no history of collective bargaining at this location of the Employer.

The record discloses that the Employer has classified its employees as follows: three foremen; four equipment operators; two laborers; ten ironworkers; one carpenter and one electrician. These job categories are derived from the Davis-Bacon Act Wage Schedule that is part of the Employer's contract for this project. The Employer uses the designations "equipment operator" and "operator" interchangeably when referring to employees in the equipment operator classification. There are four employees currently employed as equipment operators,

one of whom appears to have been classified as an operator approximately one week before the hearing.

In the construction industry, the Board has found that a separate unit of craft or departmental employees may be found appropriate, as well as a unit of employees who constitute a clearly identifiable and functionally distinct group of employees with a community of interest separate and apart from the other employees. Del-Mont Construction Co., 150 NLRB 85 (1964) R. B. Butler, Inc., 160 NLRB 1595 (1966); Dick Kelchner Excavating Co., 236 NLRB 1414 (1978). The determination here, therefore, turns on whether the petitioned-for group comprises a craft or departmental unit, or, in the alternative, whether the petitioned-for unit constitutes a clearly identifiable and functionally distinct group.

In determining whether a unit constitutes a craft unit, the Board has articulated the following framework of analysis:

> A craft unit is one consisting of a distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment. In determining whether a petitioned-for group of employees constitutes a separate craft unit, the Board looks at whether the petitioned-for employees participate in a formal training or apprenticeship program; whether [their] work is functionally integrated with the work of excluded employees; whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; whether the employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.

Burns and Roe Services Corp., 313 NLRB 1307, 1308 (1994) (footnotes omitted).

In determining whether a petitioned-for unit constitutes a clearly identifiable and functionally distinct group, the Board examines many factors, but a primary concern is the degree of integration between employees in the proposed unit and the other employees of the Employer. For example, in New Enterprise Stone Co., 172 NLRB 2157 (1968), the Board found a unit of heavy equipment operators, mechanics and oilers to be appropriate because they were a distinct functional grouping of construction employees with a community of interest separate and apart from other employees. However, in A.C. Pavement Striping Co., 296 NLRB 206 (1989), the Board ruled that an overall unit of all employees of the Employer was the only appropriate unit because there was no basis for a separate grouping.

The record establishes that beginning at least four to five months prior to the hearing, the Employer abandoned the use of employee job descriptions in an effort to have full flexibility in the assignment of work to employees. The record further establishes that employees were told when they were hired that the Employer would require them to perform tasks beyond the scope of their designated job classifications. The Project Manager testified that all employees of the Employer are expected to perform any type of work that they are qualified to do as

along as the work can be done safely. The Project Superintendent testified that the Employer purposefully sought to hire employees with skills in more than one job category because it determined that the nature of the project would require employees to perform work outside of their job categories. The foreman of a crew to which two of the operators were assigned testified that he had told the operators on his crew that if they were operating a machine and it was idle for 15 or 30 minutes, the Employer expected the operator to get off the machine and to help other employees with productive work. One of the operators on this foreman's crew testified that the foreman had not given these time-specific instructions until approximately two weeks prior to the hearing, but the operator also confirmed that, before that time, his foreman had told him simply to get out and do something when the equipment he was operating was not being used. This foreman testified that he had been directed by management months prior to the hearing to inform employees that they were to stay productive and not just sit on a piece of equipment.

The Employer divides its employees into crews under the direction of foremen. These crews are comprised of employees from the various job classifications, and no one foreman has a crew of only operators. At the time of the hearing, there were four crews. The record establishes that two of the operators were on one crew, and a third was on another crew. The record does not identify the crew to which the fourth operator is assigned. Routinely, due both to the necessities created by work demands and the specific abilities of an employee, employees from one crew are switched to another crew on a temporary basis. They receive their work directions from the foreman of the crew to which they are temporarily assigned, although the foreman of their own crew completes the time sheets for all of the crew members, even though the employees may have actually performed the work while being loaned to another crew. It appears from the record that operators are swapped from one crew to another as frequently as employees in other categories.

The Employer operates on a schedule of four days a week and ten hours each day. Operators have the same work schedule as all other hourly paid employees, and they are all paid on the same basis for overtime work. The record reflects that many of the work assignments on the project involve employees from the various categories working closely together in a coordinated effort to complete the task. Throughout the day, the operators are routinely in contact with the employees of other job categories. All hourly employees are subject to the same safety rules, required to have the same safety equipment, exposed to the same safety orientation when hired and required to attend the same weekly safety meetings conducted by the Employer. The Employer periodically also conducts job hazard analysis meetings that are attended by employees from a cross-section of employee categories. Similarly, all hourly employees go through the same hiring and orientation process, including completion of the single application form used by the Employer for employees in all job categories. The Employer does not provide or require any formal apprenticeship or training programs for employees in any job category, except the foregoing safety training, which is provided to all employees. There is no visual manner to distinguish among employees of the various categories on the job, as there are no specific uniforms, hard hats or other paraphernalia designated for particular categories of hourly employees. The Employer has one employee handbook, which it applies to all of its hourly employees.

The employees in each job category are paid an hourly rate and are provided fringe benefits in accordance with the guidelines required under the Davis-Bacon Act. This is true even when an employee may be actually performing work that is traditionally performed by employees in another job category. The hourly base wage rate for operators is slightly below both that for ironworkers and carpenters and slightly above that for the electrician and laborers.

In regard to the specific tasks performed by the operators, the record discloses that they operate various kinds of equipment, including loaders, backhoes, dozers, cranes, excavators, rollers, man lifts, and tractor trailers. The record further establishes that all operators have performed a wide variety of tasks that did not involve the operation of the foregoing equipment. Specifically, one operator was classified and paid as a laborer for the first three and a half weeks of his employment, until the first piece of heavy equipment arrived at the project site, at which time he was re-classified as an operator. The record demonstrates that, during the approximately four and a half months following this operator's re-classification until the time of the hearing, he regularly performed work that did not involve operating heavy equipment. Some examples of the work that he performed outside of the operator classification, after being re-classified as an operator, are as follows: working closely with ironworkers handling sections of truss and bolting them together; working out of a boat six to eight times to facilitate the pumping of water from an area termed the "glory hole;" digging with a shovel for about five hours while trying to locate a gas line; using a chainsaw to remove branches in the way of work; using a lawn mower on at least two occasions to cut grass; working with an ironworker and another operator fusing HDPE pipe; working with another operator in installing vitriolic pipe; working with employees from other categories while filling sandbags; assisting in installing 100 yards of fencing to keep the public out of the project; using an air drill to drill holes for dowel pins; helping to form, pour and finish a concrete transformer pad; helping other employees to pour a concrete pad near the tool trailer; and installing pond liners.

A second operator began working as an operator for the Employer in early July 2001. During his approximately eight weeks of employment prior to the representation hearing, he regularly performed non-operator work. Examples of this work include: rigging, which involves being on the ground and preparing the load for lift by a crane; cutting wood and installing decking on a bridge; handling trusses and assisting ironworkers in bolting together trusses; using a cutting torch to cut steel beams and fabricate metal supports for a retaining wall; gathering and stacking dunnage and trash from around the job site in an effort to keep it clear and safe; and helping another operator with repair work on a damaged air filter canister.

The third operator initially was hired by the Employer as a mechanic. Although this operator is now classified as an equipment operator, he has not operated a crane for the Employer. Indeed, from the record, it appears that this operator routinely engages in work that does not involve the operation of heavy equipment. Examples of the non-operator type work assigned to this employee after he became an operator are as follows: servicing small pieces of equipment such as welders; performing laborer work; pouring and finishing concrete; building pump floats for the dewatering process, welding on various jobs, including braces for a

bridge, a retaining wall, a skip pan, and poles for outside lighting; constructing starter stands for pumps; while working side by side with employees from other categories, helping to finish footers for a bridge; performing general clean up of the job site; installing dewatering pumps along with an operator; erecting forms for concrete; setting up discharge lines for pumps; working with an operator in retrieving or "dipping" fish from the "glory hole" in order to save them through release into the river; working with non-operators in filling and placing sandbags; working with an operator to splice into a water line and install valves and to grout the anchors for bridge footers; operating a jack hammer in preparation for making bridge footers; rolling and tying rubber discharge lines; working with an operator and laborers in fusing hard plastic line, called HDPE line, in a fusing machine, and constructing a concrete transformer pad; rigging loads for cranes; planting grass and spreading straw on top, along with an operator and laborers; spreading filter fabric to help create a base for roads; and working out of a boat in an effort to place a pontoon for a pump.

The fourth operator began working for the Employer as a laborer and then later moved to the job classification of carpenter. Subsequently, and it appears from the record only in the week before the representation hearing, this employee was re-classified again as an operator. Prior to his re-classification, however, he operated heavy equipment. For example, in helping dig out the footers for a bridge, he operated either an excavator or a backhoe or both; and at other times he operated a 250 loader, excavator and backhoe.

The foregoing example is but one of many instances of the performance of operator work by non-operators. Thus, the record establishes that several other employees who were not classified as operators were assigned to operate various pieces of heavy equipment that they were qualified to run. While an exhibit placed in the record reflects that every employee was qualified to operate one or more pieces of heavy equipment, and, in most instances, was qualified to operate several such pieces, the testimony established that all of these employees did not actually operate every piece of equipment that they were deemed qualified to run. Nevertheless, incidents of non-operators engaged in the operation of heavy equipment for the Employer have not been uncommon. Thus, a laborer has operated the backhoe, as has an ironworker. Another ironworker has operated the 250 loader, the backhoe, the 40-ton crane, the 22-ton crane, the man lift and the tractor trailer. A third ironworker has operated the backhoe, the tractor trailer and the man lift. A fourth ironworker has operated the tractor trailer, the man lift, the 250 loader, the dozer and the backhoe. A fifth ironworker has operated the 250 loader the backhoe, the tractor trailer and the man lift. A sixth ironworker, also has operated the 250 loader, the backhoe, the 40-ton crane, the 50-ton crane, the tractor trailer, the 22-ton crane and the man lift. A seventh ironworker has operated the 250 loader, the backhoe, the 40-ton crane and the 22-ton crane. An electrician has operated the backhoe and the 250 loader. A carpenter has operated the 250 loader and the backhoe. A laborer has operated the backhoe and the 250 loader. Furthermore, two foremen also operated heavy equipment: one has operated the 250 loader, the backhoe, the 40-ton crane, the 50-ton crane, the 22-ton crane, the tractor trailer and the man lift; and the other has operated the 250 loader, the backhoe, the excavator, the dozer, the roller, the 40-ton crane and the 22-ton crane.

As noted by the Employer in its brief, not all of the operators have in fact operated all the heavy equipment, as one of the operators has yet to operate any crane for the Employer. Further, as delineated above, several employees who are not classified as operators have operated cranes for the Employer. Since the first of September 2001, the State of West Virginia requires that all persons who operate cranes, of which the Employer has three at the project site, must be certified by the West Virginia Department of Labor. Two operators have this certification, but the other two equipment operators do not. However, one ironworker does have this required crane certification.

The record evidence contains a wide divergence of testimony concerning the average amount of time the operators each spent operating heavy equipment, as compared to performing other work tasks. The Project Superintendent stated that he felt that one operator worked as an operator only 30 to 40 percent of the time; a second operator ran heavy equipment about 60 percent of the time and a third operator performed operator work approximately 50 percent of his work time. The foreman for two of the operators testified that, just prior to the hearing, he had reviewed the time cards of the two operators on his crew and a third operator, to better familiarize himself with their respective work histories. The foreman testified that the maximum an operator would be doing non-operator work would be just over 50 percent or 21 hours out of a 40 hour work week. This foreman also said that the minimum time in a day that an operator would be directed to do work other than running heavy equipment would be one-and-a-half to two-and-a-half hours out of a ten-hour work day. The only operator called to testify at hearing was on this foreman's crew. This operator testified that he spent 90 percent of his time operating heavy equipment. He also testified concerning his observation of the work performed by two other operators, although he conceded that he had not continually monitored the work of those two employees. On rebuttal, the foreman testified that in recording the time for that operator, he could not recall the operator's ever having worked 36 out of 40 hours a week, or 90 percent of the time, performing operator tasks. As neither party elected to introduce into the record the time cards for the three operators in question, there is no documentary evidence to resolve the conflict in testimony. Based on the undisputed evidence of record, however, concerning the myriad instances of employees from non-operator classifications performing operator work, and vice-versa, as well as the record evidence demonstrating significant inter-relatedness on the jobsite, a resolution of this disputed testimony is unnecessary, as set out more fully below.

Applying the relevant legal principles to the foregoing facts, I find, in the first instance, that the petitioned-for unit does not constitute a craft unit. In this regard, there is no requirement or provision for any formal apprenticeship or training program for operators. In addition, the licensing requirement recently instituted by the State of West Virginia pertains only to the operation of cranes, is not held by one of the operators who the Petitioner seeks to represent, and is held by a welder, who the Petitioner seeks to exclude. This state certification requirement, therefore, does not operate as a bright-line distinction between operators and non-operators. Although the Board has held that a requirement of formal apprenticeship or training is not a sine qua non for the finding of craft unit status, it nevertheless has required that the petitioned-for classifications must involve specialized skills and training of a sort normally acquired through a lengthy training process or extensive experience. See NLRB v.

Metal Container Corp., 660 F.2d 1309, 1314 n. 9 (8th Cir.1980), cited in Burns and Roe Services, 313 NLRB at 1310 n.8. See also Bartlett Collins Company, 334 NLRB No. 76 at 2 (July 11, 2001). The record does not support the conclusion that the overall job duties or qualifications of the operators here fall within that framework.

In regard to the remaining criteria for determining craft-unit status, as outlined by the Board in Burns and Roe Services, the record demonstrates that the work of the operators is functionally integrated with the work of the excluded employees, the duties of the petitioned-for employees overlap with the duties of the excluded employees, and all employees share a common community of interest, including wages, benefits and working conditions. In reaching this conclusion, I rely on the record evidence, as delineated above, that demonstrates significant inter-relatedness on the Employer's Bluestone Dam project. Due to such factors as the frequent loaning of employees, including operators, from one crew to another, the regular performance of work assignments outside of their traditional category duties by both operators and all other employees and the fact that the entire work force consists of only 21 persons who are to address and complete all of the many construction tasks at this dam construction site, it is clear that all the employees of the Employer share a close working relationship and have frequent contact with one another. Indeed, there is no record evidence to indicate that the operators work in circumstances which cause them to be segregated from employees of other categories. Rather, the evidence shows that the operators interact with employees of other categories as much as or more than they interact with fellow operators. The work crews of the Employer work together and function as a team with respect to the various construction jobs. Regardless of their job classifications, all the employees on a crew regularly work in close proximity in an interrelated process, with common supervision. The Board has relied on these factors in finding that a petitioned-for construction unit does not constitute an appropriate unit. See The Longcrier Company, 277 NLRB 570 (1985); Atlanta Division of S. J. Groves and Sons Company, 267 NLRB 175 (1983).

Further, in regard to the overlap of job functions, the Board has held that the performance of secondary non-unit work by an operator does not ipso facto preclude the finding of a separate craft unit. See New Enterprise Stone Company, 172 NLRB 2157, 2158 (1968); Dick Kelchner Excavating Co., 236 NLRB 1414,1415 (1978). In addition, the Board has found that general cross-over work between classifications may not negate the separate identity of a petitioned-for unit, particularly when the work performed by classifications outside the proposed unit relates to the lesser-skilled tasks of the job. See Burns and Roe Services Corporation, 313 NLRB at 1308. In the present case, however, the overlap of functions applies both to operators and non-operators, permeates the project, and involves, inter alia, the performance of skilled operator work by non-operators.

Moreover, all the employees of the Employer share a close community of interest. Regardless of their job classifications, employees employed by the Employer perform similar tasks on the construction project. In keeping with the instructions that all employees are given by the Employer when hired, no particular job classification has exclusively one type of job function on the project; and all employees have frequent contact with one another while performing a variety of tasks together. Both operators and employees in other categories operate the many

pieces of heavy equipment found at the project site. All employees of the Employer work under the same supervisory structure, and share the same working conditions and fringe benefits. Accordingly, I find that the unit sought by the Petitioner does not constitute a craft unit.

In regard to whether the petitioned-for unit is appropriate as a departmental unit, the record provides no predicate for this contention, as the Employer's project is not organized along departmental lines. As set out above, employees of various classifications are assigned to the different crews, and are supervised in common on various work crews, to which employees are assigned and re-assigned as project needs require. I find, therefore, that the petitioned-for unit is not appropriate as a departmental unit.

Finally, based on the foregoing and the entire record, I find that the petitioned-for unit does not constitute a homogeneous grouping of employees with a community of interest sufficiently distinct from other employees in the overall unit to constitute an appropriate unit sought by the Petitioner. That is, the factors set out above that militate against finding a craft-unit status similarly preclude a finding that the petitioned-for group constitutes a clearly identifiable and homogeneous group with a community of interest separate and apart from the other employees. In this regard, I rely, inter alia, on the myriad instances of employees working out of their classifications, the inter-relatedness of the work being performed at the Bluestone Dam site, and the common supervision and working conditions. See Brown & Root, Inc., 258 NLRB 1002 (1981); A.C. Pavement Striping Co., 296 NLRB 206 (1989)

The Petitioner cites P.J. Dick Contracting, Inc., 290 NLRB 150 (1988) in support of its argument, but I note that the determining factor relied upon by the Board in that decision was the history of a pre-existing bargaining unit, which is not a factor that is present in this matter. The Petitioner also contends that the ruling by the Board in Dick Kelchner Excavating Co., 236 NLRB 1414 (1978) is controlling. However, I find the facts in that decision quite different from the present case, as the high degree of interchange in job assignments and the close daily contact between operators and employees from other categories that exist herein were not found in the Dick Kelchner case. Finally, the Petitioner argues on brief that the evidence of overlap of job duties here is inconsequential and that the various employees in the various classifications "do not work in highly integrated crews that performed various jobs and work together in close proximity…." To the contrary, I find that the wide variety of tasks performed by both operators and non-operators outside of the realm of their respective classifications demonstrates an ongoing and significant overlap of functions, irrespective of the amounts of time expended on any one particular task. In addition, the very structure of the work crews, which contain employees from more than one classification and involve transfers as project needs require, reflects an integrated process, as does the record evidence further demonstrating a significant number of occasions on which operators have worked closely with employees in other classifications.

Inasmuch as the unit found appropriate herein is larger than that sought by the Petitioner, and as the Petitioner has stated that it is unwilling to proceed to an election in a unit larger than the

one for which it filed its petition, I hereby dismiss the petition of the Petitioner. Any determination concerning the supervisory status of the foremen is hereby rendered moot.

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